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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1259

BRUCE H. SHREEVES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

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PETITIONER'S REPLY BRIEF

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April 27, 1979

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1. *Government interference with insanity defense.* Respondent correctly states but fails to answer petitioner's argument "that the government affirmatively misled the court by failing to disclose that [Shreeves] was a potential defendant in the District of Columbia" (Opp. 6).

Thus, respondent does not dispute the factual predicates for the argument, *i.e.*:

—that at the time the government stated "any trial of [Shreeves] will be in Maryland," the government knew that Shreeves would be charged with and tried for homicide in the District of Columbia.

—that an arrest warrant for Shreeves had already been prepared at the time of his extradition hearing, but that for reasons solely within the government's control it had not been served.

—that if the arrest warrant had been served, it would have been error to deny Shreeves' motion for a psychiatric examination.[1]

Instead, respondent's position is simply that the government was entitled to prevent Shreeves from obtaining a prompt psychiatric examination by (1) delaying the filing of formal charges against him until after his motion for a psychiatric examination had been denied, and (2) making a misstatement of fact to the court presiding over his extradition hearing. Significantly, in taking this position, respondent ignores a key element of petitioner's argument: that in the District of Columbia, the burden of proving an insanity defense rests on the defendant. Whatever might be the case in a jurisdiction where this burden is on the prosecution, interference with a defendant's ability to establish his insanity defense cannot be permitted where the government has already imposed this heavy burden on his defense.

2. *Denial of right to counsel.* Respondent's Opposition intimates that *Brewer* v. *Williams*, 430 U.S. 387 (1977),

[1] *See Cannady* v. *United States*, 122 U.S. App. D.C. 120, 351 F.2d 817 (1965); *Mitchell* v. *United States*, 114 U.S. App. D.C. 353, 316 F.2d 354 (1963); *Ward* v. *United States*, 120 U.S. App. D.C. 311; 346 F.2d 423 (1965). Although respondent persists in arguing that there was "no basis" for the extradition court to order a psychiatric examination (Opp. 6), it fails to point out that the government conceded at the extradition hearing that District of Columbia law authorizes a court-ordered psychiatric examination "when a person will stand trial . . . in the District of Columbia." Opposition to Defendant's Motion for Psychiatric Examination, dated March 8, 1973, at 2. Indeed, in one of the cases cited by respondent, the court *did* order a psychiatric examination in the context of an extradition hearing. *Lathan* v. *Reid*, 108 U.S. App. D.C. 58, 59, 280 F.2d 66, 67, *cert. denied*, 364 U.S. 865 (1960).

determined that a represented defendant could be interrogated without notice to his counsel. In fact, *Brewer* explicitly reserved that question, 430 U.S. at 405-06 and n.11, and reversed a conviction based upon such an interrogation. Similarly, respondent's intimation that since *Brewer* the lower courts have been approaching consensus on this question is wrong. At least two state courts of last resort have held, since *Brewer*, that such interrogation may not be permitted. *People* v. *Tompkins*, 45 N.Y. 2d 48, 380 N.E.2d 311, 408 N.Y.S.2d 485 (1978), *cert. denied*, —— U.S. ——, 99 S. Ct. 1288 (1979); *Commonwealth* v. *Sparrow*, 471 Pa. 490, 370 A.2d 712 (1977).[2] And those federal and state appellate courts that have upheld interrogation without notice to counsel have done so over strong dissents. *See, e.g.*, *United States* v. *Brown*, 569 F.2d 236, 241-48 (5th Cir. 1978) (en banc) (Simpson, Goldberg, Godbold and Morgan, JJ., dissenting); *United States* v. *Rodriguez-Gastelum*, 569 F.2d 482, 488, 489 (9th Cir. 1978) (en banc) (Goodwin, Browning, Anderson, Hufstedler and Ely, JJ., dissenting); *People* v. *Green*, —— Mich. ——, 274 N.W.2d 448, 455, 456 (1979) (Moody, Kavanagh and Levin, JJ., dissenting).[3]

Respondent asserts that "in appropriate circumstances an accused may validly waive the right to counsel without consulting his attorney" (Opp. 8). But in arguing that this case presents such an "appropriate circumstance," respondent once again ignores a critical fact: that at the time of the uncounseled interrogation here, the government was on notice that Shreeves was of ques-

[2] As this Court recently indicated, a conflict among state as well as federal jurisdictions on a question of federal constitutional law provides a basis for a grant of certiorari. *See Delaware* v. *Prouse*, —— U.S. ——, 99 S. Ct. 1391, 1394-95 at nn.2 & 3 (March 27, 1979).

[3] *United States* v. *Monti*, 557 F.2d 899 (1st Cir. 1977), cited by respondent, is hardly on point, involving as it did a defendant who was not in custody and who himself initiated a meeting with secret service agents immediately after consulting with his attorney.

tionable mental competence.[4] To permit the government to bypass Shreeves' attorney under these circumstances cannot, consistent with the Sixth Amendment, be tolerated.[5]

3. *Improper substitution of jurors.* Respondent's argument on this point not only contradicts the government's position below, but distorts the facts. Respondent asserts that:

> "[T]he two parts of petitioner's trial were *entirely separate and distinct*, and the two sets of deliberations were *wholly independent*. . . . The substitution of jurors prior to the deliberations at the end of the second phase of the trial was therefore wholly different from the substitution of alternate jurors during the deliberations in a single-phase trial, or in the midst of the deliberations in one or the other phase of a bifurcated trial" (Opp. 11; emphasis added).

[4] As this Court has just noted, "the question of waiver must be determined on 'the particular facts and circumstances surrounding th[e] case, including the . . . conduct of the accused.'" *North Carolina* v. *Butler*, —— U.S. ——, No. 78-354, slip. op. at 6 (April 24, 1979). Application of this standard would require respondent to explain how a represented defendant can be found knowingly and intelligently to have waived his right to counsel in an interview where he stated: "I believe I am Jesus Christ and that I wrote the Ten Commandments" (Tr. Vol. 3, p. 535).

[5] Respondent's lengthy footnotes (Opp. 3, n.1.; Opp. 9, n.2) attempt to minimize Deputy Purdy's failure to inform Shreeves' attorney, Golton, of his intended interrogation on the ground that Golton had previously indicated that the "last decision" on whether to respond to police questioning was his client's "prerogative." This, of course, is no more than a careful attorney's accurate statement of the law. But, as respondent admits, Golton made it clear that he would advise Shreeves not to talk with Purdy (Tr. Vol. 3, p. 496) and that he would "certainly want to be there" at any interrogation (Tr. Vol. 4, pp. 1016-17). Moreover, respondent appears to concede and makes no attempt to justify the fact that although Purdy was fully aware of Golton's wishes, he made no attempt to contact Golton even though he had ample time to do so while waiting at the jail to see Shreeves.

This "separate and distinct" treatment of the two parts of his trial is precisely what Shreeves requested when he moved for a bifurcated trial with two separate juries. But Shreeves' motion was denied after the government argued:

> "[T]he facts as they are found by the [first phase] jury is what controls on the insanity issue also and, therefore, a stipulation, or even a second jury hearing along with the first jury, could not adequately meet that requirement of law." (Tr. Vol. 1, p. 43.)

In its closing argument at the *insanity* phase, the government emphasized that the two phases of Shreeves' trial were *not separate and distinct*—the precise opposite of what respondent now urges. The jury was told:

> "Now, this brings us to another thing. *This isn't just a separate trial.* You don't forget everything that happened before. You have to take into consideration, when you determine whether or not Bruce Shreeves was nuts, if you want to use that term, on the 26th, that the evidence show you that he did, in that trial, the way he behaved on the night of the 24th as you heard about, the complete day of the 25th and then on the 26th. Was there anything in any of that testimony that showed you that there is a question about that man's ability to know what he was doing and to decide what he wants?
>
> "Was there any kind of indication whatsoever that you heard that showed that? You heard what the defendant was. And you heard how, during the trial, one of the things was a question of who did the shooting. You heard how it didn't matter. It doesn't make a bit of difference.
>
> "*But that comes over and it carries into this too*, and it goes into what the government has argued from the very beginning in this case . . . ." (Tr. Vol. 23, pp. 1578-79; emphasis added.)

Respondent's factual assertions thus cannot be supported by the record in this case.

Respondent's only answer to petitioner's argument that substitution of jurors after deliberations have begun is contrary to Rule 24(c) and the Constitution—an argument based on logic, history, and an unbroken line of case law—is to point to the speculative possibility that some mistrials may result from the unavailability of alternate jurors in the second phase. Of course, this danger can easily be avoided by impaneling two separate juries, as Shreeves initially requested. But, in any event, as this Court held only last week, a state's interest in saving "time and expense [in] the administration of its system of criminal justice" cannot be permitted to transgress "the substance of the jury trial guarantee." *Burch* v. *Louisiana*, —— U.S. ——, 47 U.S.L.W. 4393, 4395 (April 17, 1979).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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